

July 11, 2011

Water Docket  
U.S. Environmental Protection Agency  
Mailcode 2822T  
1200 Pennsylvania Ave., NW  
Washington, DC 20460  
Attn: Docket Number EPA-HQ-OW-2010-0782

**Re: Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges from Construction Activities**

On behalf of the 5,000 members of the American Road and Transportation Builders Association (ARTBA), I respectfully offer the following comments on the U.S. Environmental Protection Agency's (EPA's) April 25 *Federal Register* notice concerning the Draft National Pollutant Discharge System (NPDES) Permit for Stormwater Discharges from Construction Activities.

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than \$200 billion annually in U.S. economic activity and sustains more than 2.2 million American jobs. ARTBA members routinely deal with stormwater issues as part of the existing environmental review and approval process required for all transportation improvement projects.

As part of every project with which they are engaged, ARTBA members must participate in a clearly-established transportation planning process. According to a report by the U.S. Government Accountability Office (GAO), as many as 200 major steps are involved in developing a transportation project from the identification of the project need to the start of construction. According to the same report, it typically takes between nine and 19 years to plan, gain approval of, and construct a new major federally funded highway project. This process involves dozens of overlapping state and federal laws—including dealing with stormwater issues.

A study by the U.S. Federal Highway Administration (FHWA) found the time required to process environmental documents for transportation projects has doubled over the past two decades. In the 1970s, the average time for completion of an environmental impact statement (EIS) was 2.2 years. Former U.S. Department of Transportation (U.S. DOT) Assistant Secretary for Policy Emil Frankel reported that from 1999-2001 the median time for completing an EIS was 4.4 years. However, delays in the transportation project environmental review and approval process are not only limited to large projects requiring an EIS. While FHWA reports three percent of federally funded transportation improvement projects require an EIS, the remaining 97 percent require an environmental assessment (EA), (6.5 percent) or categorical exclusion (CE)



(90.6 percent). A report conducted by the National Cooperative Highway Research Program (“NCHRP”) stated:

“[D]elays in completing [EA and CE] reviews are encountered frequently despite the minimal environmental impacts associated with such projects. Even if such project-level delays are individually small, their cumulative impact may be significant because most transportation projects are processed as CEs or EAs.<sup>1</sup>”

Water quality issues, including stormwater, are dealt with during the NEPA process. According to the report, 63 percent of all state DOTs responding to the survey reported environmental process delays with preparation of CEs and 81 percent reported similar delays involving EAs. These delays triple average environmental review times for CEs—from about eight months to just under two years—and have more than doubled review times for EAs, from under 1.5 years to about 3.5 years.

ARTBA members have participated in a variety of work group meetings with EPA staff specifically concerning stormwater runoff regulations, particularly from construction projects. One area of particular concern, which has been discussed in these meetings and is also present in the proposed general permit, is the establishment of specific numeric standards for stormwater runoff. Currently, many transportation projects effectively use state-specific Best Management Practices (BMPs), as opposed to set numeric standards, to address stormwater concerns and effectively balance environmental protection without exacerbating already arduous delays. In discussing how to approach future regulation of stormwater runoff, ARTBA strongly supports allowing states to continue the use of BMPs as opposed to more stringent “one size fits all” approached relying on such predetermined numeric standards.

BMPs allow the flexibility necessary for project sponsors to be able to select stormwater control techniques best suited to a projects particular circumstances. Every transportation project faces unique challenges based on a number of factors, including where actual construction is taking place, the size of the project and climate issues such as rainfall amounts during the time construction is being performed. A numeric standard applied to all projects, however, would not be able to take such differences into account. Transportation projects in areas with heavy rainfall would be held to the same effluent limitation standards as projects in dry, arid regions. Such a “one-size-fits-all” approach to stormwater permitting could constrain and/or delay transportation projects by treating them like concentrated development projects and forcing them to adhere to numeric standards designed for an entirely different type of construction activity.

In one specific instance, an ARTBA member company had a project on a fairly large site (70 to 100 acres). It started out as a \$4,000,000 project. During the project, there was an “El Niño” weather cycle bringing a great deal of rain every day. The project’s customer could not afford to wait until all of the BMPs treated the water and needed the contractor to dry out the site as fast as possible so construction could continue. The contract granted weather days, but the water needed to be processed faster requiring the contractor to implement an Alternative Treatment System (ATS, which would be required on many projects to meet numeric standards) using

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<sup>1</sup> *Environmental Streamlining: A Report on Delays Associated with the Categorical Exclusion & Environmental Assessment Process*, Prepared for the AASHTO Standing Committee on Highways by TransTech Management under NCHRP contract number HR 20-7(129) (Washington, D.C. Oct. 2000).

settlement ponds, flocking, filtering, pumping, handling, etc. The contractor agreed to do this work on an audited Time and Material basis. The final cost and change order resulted in over \$1,000,000 in additional charges to the project.

The ARTBA contractor involved in this job noted most projects in that area had the same problem that summer but none of them had the ATS expense this contractor incurred. ARTBA is concerned the implementation of numeric stormwater discharge standards will add substantial additional costs by requiring expensive ATSSs, which could limit competition for transportation projects due to the high cost of purchasing equipment necessary for compliance being potentially prohibitive for smaller and medium-sized contractors. Further, these additional costs are especially troublesome for transportation projects where needs vastly outweigh available resources.

Another problem with numeric stormwater standards is the lack of availability of treatment equipment necessary to meet the standards. According to ARTBA contractor members, it could take years until there is enough equipment to fully implement numeric discharge standards. Meanwhile, many projects will be in limbo while waiting for this equipment to become available. Currently, there are only a relatively small number of vendors who sell the necessary equipment. Implementing a numeric discharge standard would essentially place transportation planners as well as the states and localities overseeing transportation projects at the economic mercy of this small group of treatment equipment vendors, at least in the short term.

Also, there are liability issues arising from the imposition of numeric standards. If a project temporarily violates a proposed numeric standard, it could open the door for litigation. Further, it is unclear who would bear the responsibility of any such litigation. Would the project planner be responsible, the contractor in charge of the job, or the sub-contractor (if there is one) assigned to deal with stormwater run-off? Ultimately, any “one size fits all” style rule may provide another avenue for project opponents to use litigation as a means to delay and disrupt transportation improvements. As soon as there is a violation of a numeric standard, a “rush to the courthouse door” could be triggered, potentially resulting in additional years of delay to affected projects.

In conclusion, future stormwater permitting measures affecting transportation projects should allow for the level of flexibility needed to make sure stormwater issues can be addressed in a manner suited to the individual nature of the project in question. Further, the issues of cost and liability need to be taken into account to ensure permitting measures do not result in additional years of delay and unnecessary costs to affected projects. ARTBA looks forward to continuing to work with EPA on stormwater issues in a manner providing the necessary flexibility in order to allow the nation to balance environmental protections with necessary transportation infrastructure improvements.

Sincerely,



T. Peter Ruane  
President & C.E.O